United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT
IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,066

Paul E. Vaughn,
Appellant

v.

United States of America,
Appellee

Appeal from the United States District Court for
the District of Columbia

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October 10, 1967

Question Presented

Where there is no evidence that there has been any taking from the victim, is it error not to direct a verdict of acquittal in a trial on a one-count robbery indictment?

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BRIEF FOR APPELLANT

Statement of Jurisdiction

Paul E. Vaughn appeals from a judgment of conviction for robbery (D. C. Code §22-2901) after a trial before District Judge John Lewis Smith and a jury in the United States District Court for the District of Columbia. Appellant is proceeding in forma pauperis under Rule 41 pursuant to an order of the United States Court of Appeals for the District of Columbia Circuit dated June 16, 1967. This Court has jurisdiction under 28 U.S.C. §1291. The case is consolidated with No. 21,067, Worrell v. United States.

Statement of The Case

This case grew out of an incident which occurred during the early morning hours of August 17, 1967. Testimony conflicted as to how the incident began or what actually occurred, but anyone listening to the evidence could safely have concluded that a fight between Tonkins and Vaughn occurred in and around a taxi cab owned by Tonkins. There also seems to be little doubt that Worrell was present or nearby during some or all of this exchange of blows. As a result of the disturbance, the police were called to the area. The police found a watch on the seat in between Vaughn and Worrell who were sitting in an automobile. Tonkins said this watch belonged to him. There is no evidence as to when or how Tonkins lost possession of the watch. There is no evidence that either Vaughn or Worrell took the watch from the person or the immediate actual possession of Tonkins. There is no evidence that Vaughn ever even knew of the existence of the watch prior to the police search. There is no evidence that anybody took the watch from Tonkins by force and violence, against resistance or by putting Tonkins in fear.

Statute and Rule Involved

Sec. 22-2901 Robbery

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 29. Motion for Acquittal

(a) Motion for Judgment of Acquittal. . . . The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Statement of Points */

1. There is no evidence that anyone took a watch from the person or from the immediate actual possession of Tonkins.

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*/ At the trial, counsel for Vaughn objected (Tr. 208) to admission in evidence of the watch (Govt.'s Exh. 1) on the basis of its having been unlawfully seized. We submit that this objection should have been sustained and that Vaughn's conviction should be reversed on this ground, but, since counsel for Worrell has briefed the point, we are not pursuing it further here.

Summary of Argument

The crime of robbery includes certain essential elements. These were not proven. Defendant moved for judgment of acquittal both at the conclusion of the prosecution's case and after presenting evidence for the defense. The trial judge should have granted both motions. The question is not one of credibility, weight of the evidence, or justifiable inferences; there was a complete failure of proof such that no reasonable mind could fairly conclude that defendant's guilt of the offense charged was established beyond a reasonable doubt.

Argument

I. The Evidence Was Insufficient To Allow A Reasonable Man To Exclude Every Reasonable Hypothesis Except That Of Guilt.

Consistent with the statutory definition of robbery, the indictment charged that Vaughn and Worrell

1. by force and violence and against resistance and by putting in fear,
2. stole and took from the person and from the immediate actual possession of Tonkins,
3. property of Tonkins of the value of $17.50, consisting of one watch of the value of $17.50.

The testimony offerred to prove these elements was dramatically deficient under the applicable rule of law:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Curley v. U.S., 81 U.S. App. D. C. 389, 160 F.2d 229, 232 (1947)

Assuming that the jury believed every witness whom the prosecution offerred,[1/] the proof was as follows. Tonkins, at some time before a fight with Vaughn on August 17, possessed a watch. He identified as his a watch found by the police in Vaughn's automobile after the fight. There is no evidence to exclude the possibility that Tonkins lost his watch half an hour or six hours or three days prior to his fight with Vaughn on August 17. (It is only by inference that one can exclude the possibility that Tonkins either gave or sold the watch to Vaughn.) This is not a case in which "a reasonable mind might fairly have a reasonable doubt or might not have one" (Curley v. United States, 81 U. S. App. D. C. 389, 392, 160 F.2d 229, 232, cert. denied, 331 U. S. 837 (1947)). There is nothing in the record from which a reasonable man could exclude the reasonable hypotheses either that Tonkins lost his watch prior to the fight with Vaughn or that he lost it during the fight without the knowledge of either of them. There is testimony that another man picked up the watch from the ground having no idea whose it was. On the state of the evidence the jury was left to speculate,

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1/ We do this for the purpose of this argument only.

to guess. And there was nothing even to suggest that Vaughn ever had any contact with the watch or ever knew of its existence. The Government's evidence in this case "did not establish a basis for a reasoned finding, surpassing speculation, that beyond all reasonable doubt" a robbery was committed. (Austin v. United States, D. C. Cir. No. 19,903, 6/16/67, slip opinion p. 17).

On the morning of August 17, the police responded to a call of a disturbance, not a robbery. Indeed, Tonkins did not report that he was missing anything. Only after Officer Yates, having picked up a watch from the seat of the automobile in which Vaughn and Worrell were apprehended, asked Tonkins about the watch did Tonkins assert that his watch was missing. Yates testified (Tr. 158) that on picking up the watch:

> I asked Tonkins was he missing anything and he said, "Let me check," or something to that effect. He said, "Wait a minute, let me check. I don't know." I don't know exactly what he did say. He said, "Wait a minute, I don't have my watch with me."

Tonkins never testified how or when he lost his watch. Officer

Yates testified at an earlier hearing and confirmed again at the trial (Tr. 165) as to Tonkins' knowledge:

> Q: He did not know how it was gone.
>
> A: That is correct.

Worrell testified (Tr. 225) that when he was pulling Vaughn away from the fight with Tonkins, he picked up a watch. Worrell stated: "As I was grabbing him and I backed up I stepped on something, and I reached down and picked it up, but I didn't pay it no mind. It was a watch. So I just did even say nothing to him. We went and got in the car and the cab driver pulled past us. He went on about his business." Worrell further testified (Tr. 226) "We got in the car and I throwed the watch on the seat." As to picking up the watch, Worrell answered a series of questions (Tr. 229)

> Q: Where did you pick up the watch with respect to the taxicab, on the curb?
>
> A: No, sir, it was in the grass at the rear of the taxicab.

Q: The grass at the rear of the taxicab?

A: Yes, sir.

Q: Now, it's a paved street, isn't it?

A: No, sir.

Q: It's not paved?

A: You see, from the curb, I'd say about seven inches is grass.

Q: Well, you're talking about the sidewalk?

A: Yes, sir, between the sidewalk and the curb.

Q: There's some grass?

A: Yes, sir.

Q: And that's where you found the watch?

A: Yes, sir.

Q: Towards the back of the cab?

A: Yes, sir.

Q: About how far back of the cab?

A: It was just about even with the cab.

Q: Just about even with the cab at the back?

A: Yes, sir.

Q: Did Vaughn see you pick up this watch?

A: No, I don't think he did.

There is no evidence that Vaughn ever knew of the watch's existence. On this point Worrell testified (Tr. 249):

> Q. Did you tell Mr. Tonkins you had the watch, or did you tell Paul Vaughn?
>
> A. I didn't say nothing to either one of them.
>
> Q. What did you do with it after you picked it up?
>
> A. When I got ready to get in the car I just throwed it on the seat because I thought maybe it was his.

At a hearing at the General Sessions Court, Mrs. Vaughn, the defendant's mother, talked with Tonkins. As Mrs. Vaughn testified (Tr. 260), "Well, I talked to him and I asked him if he had lost anything that I would be willing to pay for it if he would drop the case, and he said no he didn't lose anything. He said the only principal thing was he got hit. He hit him."

Charles J. R. Nesbitt, a friend of Tonkins for twenty years or more (Tr. 263) testified (Tr. 272) that later in the morning of August 17 following the incident: "I asked him did he know anything about -- I asked did anything happen to him or had he been robbed, and he told me no he had not." On cross-examination, he was asked, "But when Mr.

Tonkins talked to you he said that he had not been robbed; is that correct?" "Yes, sir, that's correct." (Tr. 272)

Nesbitt later testified (Tr. 286) that Tonkins told him, ". . .it must have been some other cab that had been robbed."

Vaughn himself testified (Tr. 312-313) that he knew nothing about this watch.

> Q. You never saw that he picked up something?
>
> A. No, I didn't.
>
> Q. And you never knew he had a watch and put it in your car?
>
> A. He never said nothing to me about a watch.

Vaughn testified that he had a watch of his own on his wrist that day (Tr. 313) and he had about $65 to $70 in his pockets (Tr. 317).

On this state of the evidence, a reasonable man cannot properly conclude that anyone robbed Tonkins, that anyone took a watch from Tonkins' person or immediate actual possession, or that anyone took a watch by force and violence, against resistance or by putting Tonkins in fear. The jury, presented with the alternative of conviction or acquittal may have felt that Vaughn's conduct was not blameless, and so

found him guilty.[2/] But whatever unsocial behavior Vaughn may have been guilty of, it was not that charged in the indictment.

This is a clearer case for reversal than Miller v. United States, 116 U.S. App. D. C. 45, 320 F.2d 767 (1963), a case in which a robbery conviction was reversed where the evidence showed that the victim felt a jostle and two people ran away. The jury "should not have been allowed to speculate"

2/ This human but clearly irrational process of the jury was probably encouraged by the confusing instruction (Tr. 395) on possession of recently stolen property:

> "If you find beyond a reasonable doubt that the defendants were in exclusive possession of the property of the complainant and that this property had recently been stolen, and that the defendants' possession of the property on the date in question and under the circumstances in question has not been satisfactorily explained, then you may, if you see fit to do so, infer therefrom that the defendants are guilty of robbery."

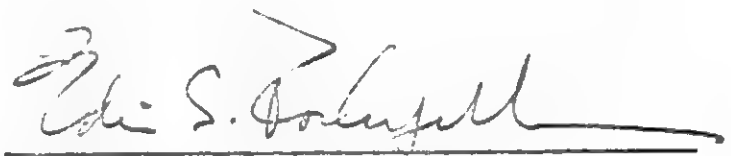
While this sort of inference might have justified a conviction of larceny, it could not properly sustain a conviction of robbery under the circumstances of this case where there was insufficient evidence that any robbery had occurred. The question for the jury here was not: Given evidence of a robbery, did the defendant commit it? The question was: Was a robbery committed at all?

how the watch left Tonkins' possession. Hunt v. United States, 115 U. S. App. D. C., 316 F.2d 652, 655 (1963).

CONCLUSION

For the foregoing reasons, the conviction of robbery should be reversed and the indictment dismissed.

Respectfully submitted,



Edwin S. Rockefeller
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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of this Brief has been mailed first class postage prepaid to Frank Q. Nebeker, Assistant U. S. Attorney, United States Courthouse, Washington, D. C., and to Charles A. Case, Jr., 1625 K Street, N. W., Washington, D. C. 20006, counsel for John H. Worrell.

Edwin S. Rockefeller

October 10, 1967

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,067

JOHN H. WORRELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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August 25, 1967

QUESTIONS PRESENTED

In the opinion of the Appellant, the following questions are presented:

1. Did the trial court error in denying Appellant's Motion for Acquittal at the conclusion of the Government's case, or in the alternative at the conclusion of the Defendant's case?

2. Did the trial court error in refusing to grant Appellant's Motion to Suppress that evidence which was obtained pursuant to an illegal search and seizure?

3. Did the trial court commit plain error which affected the substantial rights of Appellant by not instructing the jury that it was within their power to find one of the codefendants innocent while finding the other guilty?

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BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction for robbery (D.C. Code § 22-2901) after a trial before John Lewis Smith, J., and a jury, in the United States District Court for the District of Columbia. The District Court's jurisdiction derived from Title 11, District of Columbia Code, Section 306. Appellant is proceeding in forma pauperis pursuant to an order of the United States Court of Appeals for the District of Columbia Circuit dated June 16, 1967. The jurisdiction of this Court is invoked under Rule 41 of the General Rules of this Court and Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Appellant and Paul E. Vaughn were arrested on August 17, 1966. On October 5, 1966 Appellant and Paul E. Vaughn were indicted on one count of robbery under Title 22, District of Columbia Code, § 2901. Appellant and Vaughn pleaded not guilty. Appellant's Motion to Suppress and a Motion for a Bill of Particulars were heard before Judge John J. Sirica on January 6, 1967. Both Motions were denied.

Appellant and Vaughn were tried in a jury proceeding before Judge John Lewis Smith, Jr., United States District Court for the District of Columbia (Criminal Case No. 1194-66). The trial commenced on April 12, 1967. On April 14, 1967 the jury returned a verdict of guilty as indicted with respect to both defendants. On June 2, 1967 Appellant was sentenced to one to four years. Vaughn was sentenced to three to six years.

At the trial the complaining witness, David F. Tonkins, testified for the prosecution. Tonkins testified that on the morning of August 17, 1966, at about 3:30 a.m. he parked his taxi cab in front of the apartment building in which his long-time acquaintance, Charles Russell Nesbit, resided (1 Tr. 25, 2 Tr. 334).[1/] Tonkins stated that he had been in the company of Nesbit for most of the previous evening and that Nesbit had

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1/ The transcript of this case appears in two volumes. Hereinafter the first volume will be referred to as 1 Tr. and the second as 2 Tr.

earlier agreed orally to purchase from him a station wagon (1 Tr. 21, 22). After arriving in front of Nesbit's apartment, Tonkins got into the back seat of his parked cab, locked the doors, and waited for Nesbit to return with a deposit for the station wagon (1Tr. 24, 25). Nesbit testified for the defense.[2/] Nesbit confirmed that he had spent much of the previous evening and night with Tonkins at the Vista Raceway in Vista, Maryland (2 Tr. 263). Nesbit also testified that Tonkins was intoxicated and that he remained in the back of his cab because "he didn't want to go home just then because he would have to explain something to his wife, . . ." (2 Tr. 268, 269).

Tonkins testified that after getting into the back of his cab the next thing he recalled was two men, one on each side of the cab, "shaking" the doors (1 Tr. 25). It was later elicited on cross-examination that although the "shaking" was the next thing he recalled, Tonkins had then been in the back seat of his cab for approximately two hours (1 Tr. 55, 56). In response to the question as to whether or not he was awake during the two hour interim, Tonkins answered, "Well, I wouldn't say that I was awake, but if anyone came up to my car, if I was asleep, I would wake up." (2 Tr. 338).

2/ Although Mr. Nesbit testified for the defense he was subpoenaed, apparently, by the Government (2 Tr. 289-290).

Tonkins further testified that after the men started shaking the doors, one door opened, a man entered, demanded his wallet, shook him and struck him on the head. After refusing to give up his wallet Tonkins leaned back on the seat and kicked the man out of his cab. Upon the man's re-entry into the cab, Tonkins offered to give up his wallet whereupon the two men disappeared without taking the wallet (1 Tr. 25, 26, 56). Tonkins testified that he did not call the police but that the police arrived at the scene of the incident about a minute later (1 Tr. 27).[3/]

At the trial, Tonkins identified defendant, Paul E. Vaughn, as the man who entered his cab. Tonkins was unable to identify the man who was at the driver's side of the car but described him as being tall and slender and wearing a dark shirt (1 Tr. 31, 32).

Mrs. Jessie Clark, a near-by resident, testified for the prosecution. Mrs. Clark stated that at 4:45 a.m. on the morning of August 17, 1966 she heard someone outside her window say "Im not going to give it over to you." (2 Tr. 178). Upon hearing this Mrs. Clark stated that she looked out her window and saw two men pulling on the doors of a taxi cab - a slim man of the driver's side and a heavier man on the passenger side (2 Tr. 179).

3/ Private Stone and Officer Wiggs stated that they first encountered Mr. Tonkins about two blocks from the scene of the incident (1 Tr. 112-113, 116). Either Mr. Tonkins is mistaken about where he first met the police or the policemen he first met did not appear at the trial.

She stated that the larger man got into the front seat of the cab and was either hitting or pulling the cab driver who was seated in the rear of the taxi. She then saw the cab driver kicking the man that was in the front seat (2 Tr. 181). Mrs. Clark testified that she then yelled out the window whereupon the men left (2 Tr. 182, 183). It was about 15 minutes later when Mrs. Clark noticed the police talking to the two defendants (1 Tr. 195).

Mrs. Clark identified Paul E. Vaughn as the man she saw entering the front of the cab. She could not identify the other man and could describe him only as being slim (2 Tr. 180, 181).

Private Clinton Stone and Officer William O. Wiggs testified for the prosecution. Private Stone testified that at about 5:30 a.m. on the morning of August 17, 1966, he and Officer Wiggs were responding to a call for a fight. After not observing anything Stone stated that two "gentlemen walked across the street in front of the scout car." Officer Stone asked the "gentlemen" (the defendants herein) for identification and the defendants complied (1 Tr. 101-103). Shortly thereafter Private Stone and Officer Wiggs observed Tonkins in his cab about two blocks from the scene of the incident and driving back towards the scene of the incident (1 Tr. 112-113, 116). Private Stone further testified that it was at this time that Tonkins stated to him that he had been robbed. After getting a description of the two men from Tonkins, Private Stone stated that he put out on the air, "'Subjects may be the ones responsible for the robbery.'

I put out their names, their addresses and the tag number of the Ford that they were in." (1 Tr. 107).

Upon cross-examination, it was elicited from Officer Wiggs that defendant Vaughn lived in the area where the two officers first stopped the defendants.

At about 5:30 a.m. of the morning in question, after hearing the "lookout" which was broadcast by Private Stone, Private Paul Mead and Officer Roswell P. Yates in another scout car stopped the defendant's car (1 Tr. 132, 133). Officer Yates pulled his scout car in front of Defendant Vaughn's car whereupon Officer Yates went to the right side of Vaughn's car and Private Mead went to the left side (1 Tr. 162, 133). Officer Yates then proceeded to check the front seat of Vaughn's car. In testifying, Officer Yates stated that he was unable to see that anything was under the seat (1 Tr. 157) but that he picked up the loose seat cover flap to see if anything was under it. As he lifted it up he saw a watch under the loose cover (1 Tr. 155, 156). As Officer Yates was picking up the watch the complainant arrived. Officer Yates asked Tonkins if he had lost anything to which Tonkins replied, ". . .let me check, I don't know." "Wait a minute, I don't have my watch with me." (1 Tr. 158). Tonkins then identified the watch as his (1 Tr. 158). Tonkins had earlier testified that the first time he knew his watch was missing was when the police asked him to identify the watch which they had seized from Mr. Vaughn's car. (1 Tr. 37-38).

Private Mead testified that Vaughn's car was searched without a search warrant (1 Tr. 147). He also stated that the defendants were apprehended a half a block from where Vaughn lived and that neither defendant made an attempt to flee (1 Tr. 139).

It was elicited from Officer Yates that he and Private Mead stopped Vaughn's car pursuant to a "lookout". When asked if Vaughn and Worrell were stopped because of a robbery report, Officer Yates responded "No, a lookout, sir. Q. A lookout? A. That's right, sir." (1 Tr. 165). It was also elicited from Officer Yates that it did not occur to him that there was evidence of a crime until Tonkins said his watch was gone. (1 Tr. 167).

After denial of a Motion for Acquittal (2 Tr. 209), the defendants testified in their own behalf. Both Vaughn and Appellant testified that on the morning in question they went to Nesbit's apartment expecting to find a party (2 Tr. 222-223, 292). They further testified that Nesbit requested that Vaughn go outside and wake up Tonkins, the taxi cab driver (2 Tr. 223, 292). Vaughn stated that he then proceeded outside to wake up Tonkins. Finding the back door locked, he opened the front door on the passenger side and woke up Tonkins (2 Tr. 292-293). Tonkins looked "like he was crazy, you know, and he kicked me. . ."(2 Tr. 293). After being kicked, the defendant Vaughn hit Tonkins (2 Tr. 293). Worrell testified that in leaving Nesbit's apartment, he did not go with Vaughn to the front of the building but instead went around back to "relieve" himself (2 Tr. 223).

After "relieving" himself Worrell preceeded to the front of the building where he saw Vaughn and Tonkins struggling. In attempting to stop Vaughn, Worrell "stepped on something." (2 Tr. 225). He then stated, "I reached down and picked it up, but I didn't pay it no mind, It was a watch" (2 Tr. 225). Worrell testified that he believed the watch belonged to Vaughn (2 Tr. 249). The defendants then proceeded to Mr. Vaughn's car where they were stopped by police officers. The defendants testified that the officers had drawn their guns (2 Tr. 229, 295).

Nesbit, who has known Vaughn for 8 or 10 years and Tonkins for over 20 years, testified that Vaughn and Worrell arrived at his apartment that morning and that he requested that Vaughn go outside and wake up the cab driver, Tonkins (2 Tr. 263, 273, 282-283). Nesbit was not aware of what happened after the defendants left his apartment (2 Tr. 284). Motions to Suppress the watch and for Acquittal were renewed and denied (2 Tr. 320).

In rebuttal the Government re-examined witnesses Clark and Tonkins. The prosecution rested. Defendants' Motions for Judgment of Acquittal were denied (2 Tr. 346).

STATEMENT OF POINTS

1. The trial court erred in denying Appellant's Motion for Acquittal at the conclusion of the Government's case, or in the alternative, at the conclusion of the defendant's case.

2. The trial court erred in refusing to grant Appellant's Motion to Suppress that evidence which was obtained pursuant to an illegal search and seizure.

3. The trial court committed plain error which affected the substantial rights of the Appellant by not instructing the jury that the guilt or innocence of each codefendant must be considered separately.

SUMMARY OF THE ARGUMENT

1. The only possible theory on which Appellant could have been convicted is as an aider and abettor of Defendant Vaughn. In order to find Appellant guilty on this theory, the prosecution must prove beyond a reasonable doubt that Appellant's conduct was in furtherance of a criminal design or that Appellant "shared" in an intent to commit robbery. Assuming the prosecutions evidence to be reliable and drawing all reasonable inferences of fact in favor of the prosecution, the evidence would establish only that Appellant was at the scene of the incident and that he was later found in a car which contained the complainant's watch. Assuming

also that Defendant Vaughn intended to rob the complainant, there nevertheless exists no basis for concluding Appellant was aware of this intent. Only through conjecture and speculation could one conclude Appellant's guilt beyond a reasonable doubt. Appellant was therefore, as a matter of law, entitled to a judgment of acquittal.

2. In order to discover the watch, of which Appellant was convicted of robbing, it was necessary for the arresting officer to search the car in which Appellant was seated. The facts establish that the arresting officer had neither a search warrant nor probable cause to believe the car contained the fruits of a crime. Nor can the search stand on the theory that it was incident to a lawful arrest. An arrest without a warrant is illegal unless the arresting officer has probable cause to believe that a felony was committed or if a misdemeanor was committed in his presence. The Appellant did not commit a misdemeanor in the presence of the arresting officer. The arresting officer admitted that he was not aware of any evidence of a crime until after he seized the watch. He, therefore, did not have probable cause for believing Appellant had committed a felony. Accordingly, the trial court erred by not granting Appellant's Motion to Suppress the watch.

3. The guilt or innocence of each defendant must be determined independent of that of his codefendant. The absence of any charge instructing the jury that they could find one defendant innocent while finding the other

guilty constitutes plain error which affected the substantial rights of the Appellant.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE, OR IN THE ALTERNATIVE, AT THE CONCLUSION OF DEFENDANTS' CASES

With respect to Point I, Appellant desires the Court to read the following pages of the Reporter's Transcript: 1 Tr. 25, 37-38; 2 Tr. 179, 209, 211, 230, 268.

Appellant's Motions for Acquittal made first at the close of the prosecution's case and again at the close of the defendants' cases, were denied (2 Tr. 209, 211, 230). Both should have been granted.

With respect to the charge of robbery, the Government's case is wholly circumstantial. It rests on the testimony of the complainant and Mrs. Jessie Clark, the latter being the only disinterested observer of the incident. Both witnesses identifed Vaughn as the person on the passenger side of complainant's cab who entered the cab and engaged in a fight with complainant (1 Tr. 25, 2 Tr. 179). Complainant's testimony shows that if the watch was taken during the fight, he was unaware of the fact. Complainant's testimony further establishes that he first became aware that his watch was missing much later when Officer Yates showed complainant

a watch found under the seat cover of Vaughn's car (1 Tr. 37-38). Mrs. Clark did not see anyone take a watch or any other object away from the scene. Neither the complainant nor Mrs. Clark testified that the person on the driver's side of complainant's cab touched complainant or did anything but "shake" the door.

Accordingly, if a robbery occurred, it is clear that Appellant was not the principal actor. The only possible theory on which Appellant could have been convicted is as an aider and abettor of Vaughn. The evidence falls far short of giving rise to this hypothesis.

Appellant contends that on the basis of the Government's evidence a reasonable man must have entertained a reasonable doubt as to Appellant's guilt. On this point the Supreme Court has said:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (Emphasis added) Nye & Nisson v. United States, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949).

Judge Washington in his dissenting opinion in the Allen case pointed out that in order to be charged with aiding and abetting the jury must believe beyond a reasonable doubt that the defendant "shared in the criminal intent of the principal." Allen v. United States, 103 U.S. App. D.C. 184, 186, 257 F. 2d 188 (1958).

Giving the Government the benefit of all inferences of fact we may assume that Appellant was "shaking" the cab door. Still the evidence does not prove beyond a reasonable doubt that Appellant's conduct was in furtherance of a criminal design or that Appellant "shared" in the intent to commit a robbery. Assuming Vaughn intended to rob Tonkins, there is no basis for concluding Appellant was aware of this intent. Defendants' version of the incident is corroborated in major part by the testimony of Nesbit. Nesbit, a long-time friend of the complainant, testified that he talked with defendants at the door of his apartment and that he sent Vaughn outside to wake-up the complainant (2 Tr. 268). In light of this testimony it is entirely possible that if Vaughn intended to rob Tonkins, this intent was formed after Vaughn entered the complainant's cab. In such a case it would have been impossible for Appellant to have shared in a criminal intent. This highly reasonable hypothesis has in no way been excluded by the Government's evidence.

If "upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt, he (the trial judge) must not let the jury act, . . ." (parenthesis added) Cooper v. United States, 94 U.S.App. D.C. 343, 345, 218 F. 2d 39 (1954). Only if a reasonable mind might fairly conclude guilt beyond a reasonable doubt may the trial judge allow the case to go to the jury. Curley v. United States, 81 U.S. App. D.C. 389, 392, 160 F. 2d 229 (1947) cert. denied 331 U. S. 837. Appellant submits that only through

conjecture and speculation could one conclude Appellant's guilt beyond a reasonable doubt. Appellant submits that, as a matter of law, he was entitled to a judgment of acquittal.

II. THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION OF APPELLANT TO SUPPRESS THAT EVIDENCE WHICH WAS OBTAINED PURSUANT TO AN ILLEGAL SEARCH AND SEIZURE

With respect to Point II, Appellant desires the Court to read the following pages of the Reporter's Transcript: 1 Tr. 147, 151-152, 155-158, 162, 165-167; 2 Tr. 208, 210, 320.

At the trial, counsel for Appellant objected strenuously to the inclusion into evidence of the watch which Officer Yates seized at the time of Appellant's arrest (2 Tr. 208, 210, 320). It is the contention of Appellant that the trial judge erred in denying these motions.

In order to safeguard people from unreasonable interferences with their right to privacy the Fourth Amendment has dictated against those searches and seizures which are deemed unreasonable. The Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation,. . ." U. S. Const. Amend. IV.

It has long been established that the search of an automobile is well within the purview of this Amendment. The Supreme Court has recently

stated that "searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible." Preston v. United States, 376 U.S. 364, 366, 84 S. Ct. 881, 883, 11 L. Ed. 2d 777 (1964).

The arresting officers admitted that in apprehending the Appellant, they had neither a warrant for his arrest nor a search warrant (1 Tr. 147). In the absence of a valid search warrant a search and seizure can be deemed "reasonable" only upon a showing of probable cause, or if incident to a lawful arrest.

One of the arresting policemen, Officer Yates, testified that he was unable to see the watch which he later seized (1 Tr. 157). Officer Yates further testified that the watch was "bound (sic) underneath the loose seat cover," (1 Tr. 155) and that he "picked up the front seat and saw the watch." (1 Tr. 156). This activity certainly constitutes a search. Mere suspicion that the automobile bore the fruits of a crime is not sufficient to constitute "probable cause". In order to justify the search on the basis of probable cause, Officer Yates must have possessed knowledge of facts and circumstances sufficient to warrant a reasonable man to believe the automobile contained the fruits of a crime. Brinegar v. United States, 338 U. S. 160, 175-176, 69 S. Ct. 1302 (1949). When asked at what time it occurred to him that there was evidence of a crime, Officer Yates stated: "When Mr. Tonkins (the complainant) said, 'Here's the ones who

tried to rob me'" (Parenthesis added) (1 Tr. 167). This statement by the complainant was made after Officer Yates had seized the watch (1 Tr. 158). The search cannot then be justified on the basis of probable cause.

Appellant submits that he was illegally arrested and that since the arrest cannot stand, the search, incident thereto must also fall. Officer Yates testified that he pulled his scout car in front of Mr. Vaughn's car (1 Tr. 162). Private Mead stated that he then went to the left side of defendant's car and Officer Yates went to the right side. It is the contention of Appellant that at this point he was under the restraint of the officers and considered himself under arrest. See Kelly v. United States, 111 U.S. App. D.C. 396, 298 F. 2d 310 (1961). In the District of Columbia a police officer may arrest without a warrant only if there is probable cause for believing a felony has been committed or if a misdemeanor has been committed in the presence of the arresting officer. D.C. Code §4-140, 141. Stephens v. United States, 106 U.S. App. D.C. 249, 251, 271 F. 2d 832, 833 (1959). Appellant contends that neither of the above requisites were present at the time of his arrest and that therefore his arrest, without a warrant, was illegal.

An arrest without a warrant cannot stand on attack in the absence of a factual showing that the arresting officer had probable cause for believing the arrested person has committed a felony. Wrightson v. United States, 95 U.S. App. D.C. 390, 394, 222 F. 2d 556, 560 (1955).

In the Wrightson case, at p. 559, this Court also stated that "the requirement of probable cause for action without a warrant is surely no less exacting than is the necessity for 'probable cause' for issuance of a warrant." The record does not indicate that the arresting officer had probable cause for believing Appellant had committed a felony. Officer Yates testified that it did not occur to him that there was evidence of a crime until the complainant Tonkins arrived at the scene of the arrest and identified Defendant Vaughn. (1 Tr. 167). When asked if he stopped defendants pursuant to a robbery report, Officer Yates replied:

> "No, a lookout, sir.
>
> "Q. A lookout?
>
> "A. That's right sir.
>
> "Q. A lookout, not a robbery?
>
> "A. It was a lookout, I don't know if it was for a robbery. It was a lookout." (1 Tr. 165, 166).

Officer Yates' testimony not only lacks a factual showing of probable cause but quite to the contrary indicates no foundation for the belief that Appellant committed a felony.

Private Mead and Officer Yates were, before the arrest of Appellant, responding to a call for a "fight" involving a taxi cab driver (1 Tr. 151, 152). Although it is possible that Officer Yates believed Appellant was in some-way involved in the "fight", in the absence of a warrant, an arrest based

on this suspicion must be deemed unlawful. Assaults, threatened assaults, or affrays are classified as misdemeanors. 4/ An arrest without a warrant for a misdemeanor can be sustained only if it was committed in the presence of the arresting officer. Stephens v. United States, 106 U. S. App. D. C. 249, 251, 271 F. 2d 832, 833 n. 1 (1959).

Appellant submits that the arresting officers have not sustained their burden of showing the legality of Appellant's arrest. It is therefore the contention of Appellant that the Trial Judge erred in not granting Appellant's Motion to Suppress the watch.

III. THE TRIAL COURT COMMITTED PLAIN ERROR WHICH AFFECTED THE SUBSTANTIAL RIGHTS OF THE APPELLANT BY NOT INSTRUCTING THE JURY THAT IT WAS WITHIN THEIR POWER TO FIND ONE OF THE CODEFENDANTS INNOCENT WHILE FINDING THE OTHER GUILTY

With respect to Point III, Appellant desires the Court to read the following pages of the Reporter's Transcript: 2 Tr. 388-399.

During the course of his formal instructions to the jury the Trial Judge repeatedly referred to the guilt or innocence of the defendants (plural).

4/ The D. C. Code §22-504 and §22-1101 provides that the maximum penalty for an assault, threatened assault, or an affray shall be not more than $500 or imprisonment for not more than 12 months or both. Any offense punishable by death or imprisonment for a term exceeding one year is a felony. All others are misdemeanors. Maghan v. Jerome, 67 App. D.C. 9, 88 F. 2d 1001 (1937).

"[Y]ou will soon have for your consideration the guilt or innocence of the defendants. . ." (2 Tr. 388). "If you find beyond a reasonable doubt that the defendants. . ." (2 Tr. 395). "Now, you may find the defendants guilty. . ." (2 Tr. 396). At no point during his formal instructions did the Judge make it clear to the panel of lay jurors that it was within their power to find one of the codefendants guilty while finding the other innocent.

Although Appellant's counsel below did not object to the Trial Judge's failure to instruct the jury properly in this regard, Appellant invokes Rule 52(b) which provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Fed. R. Crim, P. 52(b).

It is the contention of Appellant that, in the absence of an instruction, it is impossible to determine whether a panel of lay jurors were aware that it was within their power to acquit only one of the codefendants. It is, on the other hand, entirely possible that the jury, composed of citizens not sufficiently aware of the many facets of the law, believed that in order to find one of the codefendants guilty, they must find both guilty. As this Court stated in Tatum v. U.S., at p. 615:

> "Failure on the part of the trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly 'affect substantial rights' within the meaning of Rule 52(b)." Tatum v. United States, 88 U.S. App. D.C. 386, 389, 190 F. 2d 612 (1951).

The Supreme Court has recognized that , "The guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part (the jury) as if he were being tried alone." (Emphasis and parenthesis added). Blumenthal v. United States, 332 U.S. 539, 560, 68 S.C. 248 (1947).

In light of the highly speculative and circumstantial nature of the case against Appellant, Appellant submits that the absence of any instruction that the jury could find one of the codefendants guilty and the other innocent constitutes plain error which affected the substantial rights of Appellant and denied him a fair trial.

CONCLUSION

Appellant urges that the decision of the United States District Court for the District of Columbia be reversed as to the offense of robbery.

In the alternative, Appellant urges that the case be remanded with instructions in accordance with those points hereinabove set forth.

Respectfully submitted,

Charles A. Case, Jr.
Attorney for Appellant
By Appointment of this Court

August 25, 1967

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the within brief is hereby acknowledged this 25th day of August, 1967.

David G. Bress
United States Attorney for
the District of Columbia

By_____

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,066

PAUL E. VAUGHN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,067

JOHN H. WORRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

ROBERT A. ACKERMAN,
Attorney, Department of Justice.

Cr. No. 1194-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Is probable cause for a warrantless arrest constituted by:

a. A cab driver's report to police that he had been robbed by two men and his descriptions of the two,

b. The identities, car type, and descriptions of two men observed by police near the scene and time of the crime which were broadcast to the arresting officers with the notation, "Subjects may be responsible for the robbery" after the observing officers noted the similarity of personal descriptions of the men they had seen to those given by the cab driver reporting robbery,

c. An independent report to police by a neighbor that she had seen two men beating a cab driver at the crime scene,

d. An apparently false denial by arrestees that they had seen either a cab driver or a fight made to police a few minutes after arrestees had been involved in a fight with a cab driver?

(2) In a robbery trial where there is evidence that property of the complainant had been stolen and the jury so finds, where there is evidence that defendants were in exclusive possession thereof shortly afterwards and the jury so finds, and where the jury finds that defendants' possession thereof has not been satisfactorily explained, may the jury infer therefrom that the defendants are guilty of robbery?

(3) Is it reversible plain error affecting the substantial rights of appellant Worrell for the trial judge not to instruct the jury separately that it could find one of two co-defendants innocent while finding the other guilty,

where the total instruction at no point implied that the jury could not acquit only one co-defendant, where the judge's use of the singular at many points made clear that the questions to be decided by the jury had to be decided separately for each co-defendant, where each co-defendant was represented by separate counsel who made separate closing arguments to the jury, and where neither defense counsel proffered such a separate instruction or excepted to the charge as given?

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants Paul E. Vaughn and John H. Worrell were charged in a one count indictment with robbery. After

jury trial before Judge Smith on April 12, 13, and 14, 1967 both were found guilty (Criminal No. 1194-66). Vaughn was sentenced to two to six years imprisonment. Of a one to three year sentence given Worrell, all but four months was suspended.

Before trial appellants claimed at a hearing on a motion to suppress that the seizure of complainant's watch from Vaughn's car following a warrantless arrest was illegal since the arresting officers lacked probable cause to arrest. The motion was denied by Judge Sirica. The watch was introduced at trial over objection based on the same grounds.

Complainant was David F. Tonkins, a sixty year old cab driver. On August 17, 1966 at about 3:30 a.m. he parked his cab in front of the apartment building where his friend, Charles R. Nesbit, lived. They had been together during the preceding hours. They had done some drinking and had talked about transfering a car Tonkins owned to Nesbit for a financial payment. Tonkins testified that: Nesbit had agreed to buy the car. Upon arrival at Nesbit's apartment building both got out. Nesbit asked Tonkins to wait there while he got some money from his apartment and was to return to the parked cab to make a deposit on the car (Tr. 24-25.) Nesbit did not return. Tonkins got into the back seat of his cab and locked the doors to rest. Nesbit testified for the defense that he had invited Tonkins in several times, but Tonkins said he preferred to sleep for a few hours and did not want to go home and explain things to his wife before sleeping (Tr. 269).

Tonkins testified that after perhaps dozing for a while he realized two men were coming up on both sides of the cab from the rear (Tr. 25-26). They shook the door handles. The right front door opened. The man on that side entered, demanded Tonkins' wallet, and hit him. Tonkins refused to turn over the wallet and fended off the robber with kicks. Tonkins managed to hide in the car seat the few dollars he had in his pocket. He realized

he had no money in his wallet and finally told the robber he could have the wallet. Tonkins kicked the robber out of his cab. He reentered and Tonkins kicked him out a second time. The robber stood up and said something to his colleague on the left side of the car over the roof, whereupon the two fled without taking the wallet.

At trial Tonkins positively identified Vaughn as the man who entered his cab and demanded his wallet (Tr. 31-32). Tonkins never saw the face of the second man on the left side of the cab. He did see the man's body and described him as tall and slender and wearing a dark shirt (Tr. 31-32).

The struggle was witnessed by Mrs. Jessie Clark from her apartment window not far above. She testified that she looked out the window at about 5:00 a.m. upon hearing a voice say, "I'm not going to give it over to you. I'm not going to give it over to you." (Tr. 178-186, 192-199). She saw two men pulling at the cab doors, a heavier man on the right whom she recognized as a neighbor without knowing his name (Tr. 180) and a slim man on the left. She saw the heavier man get in the front door and appear to hit or pull on the driver in the rear seat. The driver kicked the heavier man back who got out of the cab and then got back in the front seat on his knees. He appeared to Mrs. Clark to be throwing while the driver continued to kick at him. She yelled "Leave that man alone" and that she was going to call the police. The two men continued their efforts to get further into the car at the driver, but shortly ran away. At some point she had telephoned the police. She saw a white civilian car pull up. Its driver talked for a moment to the cab driver whom she heard say, "They tried to rob me" (Tr. 185). She saw the white car drive away. The cab driver stood outside his cab for a few minutes shaking his hands, which appeared to hurt him. About fifteen minutes after the two assailants ran off, she saw police officers [Stone and Wiggs] talking to two men sitting in a car at a distance she estimated to be less than three court room lengths and at a well lighted place. She rec-

ognized these as the same two men she had seen trying to get in at the cab driver (Tr. 196-197). Some police officers [Mead and Yates] came to her apartment in response to her call. She told them she had seen two men beating the cab driver (Tr. 326). At trial Mrs. Clark positively identified Vaughn as the man she saw entering the cab and beating the driver (Tr. 180). She testified she did not know the other man (Tr. 181).

Vaughn and Worrell both testified they had gone to Nesbit's apartment to find a party (Tr. 222-223, 292). Both testified that Nesbit asked Vaughn to go and wake up the cab driver and tell him to come in (Tr. 223, 292). Worrell testified that Nesbit wanted Tonkins to come inside to get a party going (Tr. 246). Vaughn testified he went to the cab, found the back door locked, opened the front door, and waked Tonkins up (Tr. 292-293). Vaughn testified Tonkins looked crazy, kicked Vaughn out of the cab, and came out of the cab himself, whereupon Vaughn hit him (Tr. 293).

Vaughn stated Worrell then came up after urinating behind a building and pulled him away from the fight, after which they got in Vaughn's car (Tr. 294). Worrell testified that after they left Nesbit's apartment, he left Vaughn to urinate and upon rejoining him at the cab saw Vaughn and Tonkins struggling. Worrell testified he grabbed Vaughn by the arm to pull him away from the fight. As he did so, he stepped on something. In explanation for the presence of Tonkins' watch, found later on the front seat of Vaughn's car between Vaughn and Worrell, Worrell testified, "I reached down and picked it up, but I didn't pay it no mind. It was a watch. So I just did even say nothing to him. We went and got in the car" (Tr. 225, 229-230). He stated he threw the watch on the seat (Tr. 226, 249). He stated he thought it belonged to Vaughn and never mentioned it to either him or Tonkins (Tr. 249).

Officers Mead and Yates in Scout Car No. 142 made the arrests. Mead had been with the Police Department two years and ten months, Yates two years and four months.

They received a radio run about 5:30 a.m. to check a reported fight involving a cab driver in front of Mrs. Clark's apartment (Tr. 130). The radio run was prompted by her call to the police. Before they arrived, however, Officers Stone and Wiggs in Scout Car No. 143, having also heard the radio run, arrived in the area to volunteer help in handling the fight (Tr. 101). Stone and Wiggs saw appellants passing in front of their police car and starting to get into their own car parked on 50th Place. Stone asked them if they had seen a cab driver nearby. Vaughn and Worrell both falsely denied this (Tr. 102-103, 314, 252-253). Stone asked them whether they had seen anyone fighting, which they also denied (Tr. 102). Stone took appellants' names, addresses and birth dates from identification they supplied and noted the type of car they were driving. Finding no leads for the moment to the sought-for fight, Stone and Wiggs left appellants and scouted around the area until they came upon Tonkins a short distance away on or near 50th Street. Stone asked Tonkins if he was the one who called the police. Tonkins replied he had not. He told Stone that he had been hit and robbed by two men and that his wallet had been demanded (Tr. 99, 106, 107, 113, 115, 120, 129). He described at least one of the two men who did it (Tr. 99, 107, 120). His description of a man wearing Bermuda shorts and a brownish-yellowish sweater triggered Stone's recollection of appellants whom he had just seen (Tr. 107). Stone radioed to other police cars in the area a detailed lookout including appellants' names, addresses, descriptions, automobile type, and tag number as obtained by him shortly before, stating, "Subjects may be the ones responsible for the robbery." (Tr. 107, 137, 165-168). Stone had received no report of robbery before he saw Tonkins. He reported a robbery himself in the form of this lookout based on what Tonkins had told him (Tr. 115).

Officers Yates and Mead received this lookout. They had arrived at 5:32 a.m. at the scene of the fight as given in

the original 5:30 a.m. run for a fight (Tr. 151-152). They had observed Stone and Wiggs talking to appellants as they looked around the area for a fight (Tr. 152). Not seeing one, they had gone to Mrs. Clark's apartment in search of leads, drawn by the fact it had lights on (Tr. 130, 152, 154). They had taken her report of two men she had seen beating a cab driver (Tr. 154, 326-327). They had returned to their car and radioed, "Nothing found" and were driving down Cloud Place nearby in random search of the beaten cab driver when they received Stone's radioed lookout with descriptions of the two men and the statement, "Subjects may be the ones responsible for the robbery" (Tr. 107). Mead looked to his right and saw Vaughn's car answering the description in the robbery lookout coming toward the police car out of an alley (Tr. 132). Yates, who was driving, stopped Vaughn's car by halting the police car at the mouth of the alley (Tr. 132).

Yates and Mead radioed the dispatcher that they were stopping Vaughn's car and that Stone and Wiggs in Scout Car No. 143 were bringing Tonkins to the scene (Tr. 133). After Stone had made his radio report of robbery based on what Tonkins had told him (Tr. 107), he had asked Tonkins to follow the police car in his cab while Stone and Wiggs searched more or less at random for the two robbers (Tr. 110-111). Stone and Wiggs were about a block and a half away from Cloud Place (Tr. 108, 111), when they heard a radio report by Mead and Yates that they had the two subjects stopped coming out of an alley on Cloud Place (Tr. 108). They drove immediately with Tonkins behind them to appellants' car (Tr. 108, 133, 163). As soon as Tonkins arrived he said, "Those are the two" (Tr. 159) or "Here's the ones who tried to rob me." (Tr. 167). Tonkins arrived before Yates picked up the watch from the front seat of Vaughn's car (Tr. 59, 96, 158).

Testimony by appellants and officers Yates and Mead is in conflict on some aspects of how appellants were handled after they were stopped. It is clear, however,

that Yates and Mead detained appellants until Tonkins could arrive and identify them, that the officers took measures to protect their own security against men they had reason to believe were violent robbers, that the officers brought Tonkins to the scene quickly, that Tonkins made immediate, positive identification of Vaughn as the man who came into his cab, and that appellants were arrested without a warrant.

Yates testified that he went to the right side of Vaughn's car (Tr. 155). Mead went to the left (Tr. 133). They told Vaughn to wait there a minute; they would like to talk to him; and a man would like to identify them. Yates testified Vaughn said, "O.K." (Tr. 155, 162). Yates asked for Worrell's license. Then he checked the front seat for "weapons, things like this" (Tr. 156, 163) while Vaughn was still in the car. Yates testified he usually checks the front seat of a car he stops when, as here, he has "a strong suspicion that he has wrongfully committed" [a crime] (Tr. 163-164). Yates lifted a torn cover on the seat, saw a wrist watch, and picked it up (Tr. 155, 157). Yates could not see the watch before he lifted the torn seat cover (Tr. 157). Tonkins had arrived on the scene before Yates picked the watch up (Tr. 59, 95-96, 158) and had presumably already said, "Those are the two" or words to that effect (Tr. 159, 167). His finger was bleeding from a cut (Tr. 159), although it is unclear whether Yates noticed this before or after he checked the front seat. Yates testified that he picked up the watch and asked Tonkins whether he was missing anything. Tonkins said, "Wait a minute, let me check" or words to that effect (Tr. 158). Tonkins then said, "Wait a minute, I don't have my watch with me" or words to that effect.[1]

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[1] Officer Stone testified that Tonkins told him during his initial report of the robbery that he was missing a wrist watch (Tr. 114). However, Tonkins testified that the first time he realized he was missing something was when the police asked him at the arrest scene if he had missed anything (Tr. 37-38).

Tonkins' testimony on the seizure of the watch was that the police asked him whether he had missed anything (Tr. 58). He replied he was missing his watch. Then the police reached over inside the car and picked it up and asked whether he could identify it (Tr. 58-59).

Vaughn's testimony was that one of the officers who blocked his car came up to him. This officer "had the gun" and ordered Vaughn out of the car first (Tr. 295). To Vaughn's query what the trouble was the officer said to effect, "You know the trouble". When Vaughn said he knew of no trouble the officer said to effect "You are under arrest for robbery." (Tr. 295). To Vaughn's query for robbing whom the officer said "You just shut up. You answer questions and you get your lawyer" (Tr. 295). Vaughn testified the officers then took him out of his car and put him in the patrol wagon. He denied that he had ever seen the watch at the arrest scene (Tr. 295, 310-311).

Worrell's testimony was that after the police blocked Vaughn's car Yates approached pulling his gun on Worrell and saying, "You are under arrest for robbery" (Tr. 229-231). To Worrell's query, "Robbing who" Yates said a cab driver. Yates ordered both appellants out of the car (Tr. 229). The officers searched the car and found the watch (Tr. 229). Yates showed the watch to him and Vaughn. "He asked me, 'is this your watch'?" I say, 'No, it's not.' Then he asked Paul was it his, and he says, 'No'" (Tr. 230-231). Worrell testified that Tonkins came up after the arrest and Yates' taking of the watch, identified Vaughn, but said he could not identify Worrell (Tr. 231).

Mead's testimony was that Vaughn was in the left front seat and Worrell was still in the right front when Yates checked the front seat, uncovered the watch, and picked it up (Tr. 134, 136). Mead saw Tonkins right after Mead and Yates stopped Vaughn's car (Tr. 135). Although Mead and Yates had a report of a robbery when they stopped Vaughn's car, Mead did not pull his gun at

any time and did not tell appellants with pistol drawn to get out of the car (Tr. 137).

Tonkins testified that Worrell was just getting out of the right side of the car as he came up (Tr. 34). He saw Yates pick up something from the car. Yates asked him if he was missing anything (Tr. 37-38). He told Yates he was missing a watch (Tr. 38). Yates had him describe it and then showed it to him. He identified it as his.

Worrell admitted that he was in possession of the watch when he and Vaughn were stopped by police (Tr. 229-231, 249-252).

Mrs. Clark testified that Vaughn came to her home a few days before the trial. He asked her to testify that she saw another man pick up something near the scene of the incident (Tr. 304-306, 322, 325). He said the watch had gotten him, or words to that effect. She refused to testify as he requested.

Worrell's motion at the end of the government's case for judgment of acquittal and his renewed motion to suppress the watch were denied (Tr. 209-211). Vaughn's motion for judgment of acquittal at the end of the government's case was denied (Tr. 209). Worrell's renewed motions at the end of the case for the defense to suppress the watch and for judgment of acquittal were denied (Tr. 320). Vaughn's motion at that time for judgment of acquittal was denied (Tr. 320). Worrell's motion for judgment of acquittal at the end of the government's rebuttal was denied (Tr. 346). On May 4, 1967 Worrell moved for judgment of acquittal or in the alternative for a new trial. On May 19, 1967 this was heard, argued, and denied. From judgment and committment of June 2, 1967 Vaughn and Worrell both now appeal.

STATUTES AND RULES INVOLVED

Title 22 District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatch-

ing, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 52, Federal Rules of Criminal Procedure, provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection.

SUMMARY OF ARGUMENT

I

Probable cause for the warrentless arrest of appellants by Officer Yates was available in the report to police by complainant Tonkins that he had been robbed, in the descriptions of the two robbers he gave police, in the independent report made to police by Mrs. Clark that she had seen two men beating a cab driver in the same area, and in the apparently false denials by arrestees to police that they had seen a cab driver or a fight. The validity of arrest should be evaluated upon the collective information of the police rather than that of only the arresting officer. Nevertheless, the complainant's report of robbery, descriptions of two men observed in the area matching descriptions of the robbers given by the complainant, and Mrs. Clark's report of having seen two men beating a cab driver had all been communicated speedily to the arrest-

ing officer. Since probable cause for arrest existed before the discovery of the complainant's watch in appellants' possession, the arresting officer's search of appellants' automobile for weapons and fruits or instrumentalities of the crime was incidental to a valid arrest. Accordingly, motions to suppress the watch were properly denied.

II

Evidence was available to support jury findings beyond a reasonable doubt that Vaughn and Worrell were in exclusive possession of complainant's watch shortly after it had been stolen from him and that their possession of the watch under the circumstances was not satisfactorily explained. The jury could infer therefrom that both Vaughn and Worrell were guilty of robbery. This alone was sufficient to sustain conviction in each case. Nevertheless, there was additional evidence of guilt in each case.

III

The trial judge did not err in instructing the jury without a separate statement that one defendant could be found innocent while one was found guilty, especially where this point was not raised at trial to allow the judge to add a separate instruction if he felt it necessary, where the instruction was not excepted to as given, where the instruction as given in no way implied that both appellants must be found either guilty or innocent, and where the omission only now complained of did not withhold from the jury consideration of any defense raised by the evidence.

ARGUMENT

I. Probable cause for the arrest of appellants existed at the time Officers Mead and Yates stopped their automobile.

(Tr. 59, 96, 99, 107, 114, 115, 120, 125, 136-137, 155, 158, 162, 185, 196-197, 228, 229-231, 294, 295)

Probable cause for arrest existed at the time Mead and Yates received Stone's lookout for robbery and saw appellants coming out of the alley. It is thus not critical in determining the validity of the arrest whether it was made at the moment Mead and Yates blocked Vaughn's automobile, whether it was made when Yates said, "You are under arrest for robbery", or whether it was made before or after Yates acquired the watch.

The Supreme Court has said that the determination of whether probable cause exists depends on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). This Court has delineated the concept as that which "constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment." *Bell* v. *United States*, 102 U.S. App. D.C. 383, 385-386, 254 F.2d 82, 84-85, *cert. denied*, 358 U.S. 885 (1958).[2] In determining the quantum of evidence necessary to establish probable cause the particular facts of each case are decisive. Finding that a particular set of facts constitutes probable cause does not mean an automatic decrease in the general enjoyment of freedom, of course, nor does a finding of no probable cause in it-

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[2] Restatement, Second, Torts, Section 119, Comment j lists factors going into a determination whether probable cause existed: "The nature of the crime committed or feared, the chance of escape of the one suspected, the harm to others to be anticipated if he escapes, and the harm to him if he is arrested, are important factors to be considered in determining whether the actor's suspicion is sufficiently reasonable to confer upon him the privilege to make the arrest."

self mean an increase. Liberty is equally lost whether the citizen is left to the mercy of an overzealous policeman or to a vicious hoodlum.[3]

Here the robbed cab driver reported to Officers Stone and Wiggs, already searching the area for a fight involving a cab driver, that two men had attacked and robbed him and that his wallet had been demanded (Tr. 99, 106, 107, 113, 115, 120, 129). He told Stone that a wrist watch had been taken from him (Tr. 114). He described at least one of the men with precision (Tr. 99, 107, 120). Stone broadcast this report of robbery (Tr. 107, 115) to Yates and Mead, the arresting officers. This was the first report of robbery received by any of the officers drawn to the area by Mrs. Clark's initial report of a fight involving a cab driver (Tr. 115). Stone included in his broadcast to Yates and Mead the precise descriptions and car type of appellants as recently observed by him in the area, descriptions which matched those given by the person robbed, with the notation, "Subjects may be the ones responsible for the robbery." (Tr. 107). Wiggs and Mead both knew Vaughn from before (Tr. 125, 136-137). At the moment Yates and Mead made the arrests, they thus knew at a minimum that: two men had attacked a cab driver; other officers were also investigating the matter; a radio lookout had been broadcast for appellants who "may be the ones responsible for the robbery"; and the cab driver complainant could be brought quickly to the scene to identify appellants (Tr. 133). Presumably Stone's radio lookout had included notation that a cab driver had been located who reported he had been robbed (Tr. 133, 155, 229).

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[3] In 1751 Henry Fielding, in *An Enquiry into the Causes of the Late Increase of Robbers, Etc.* observed: "If I am to be assaulted, and pillaged, and plundered; if I can neither sleep in my own house nor walk the streets, nor travel in safety; is not my condition almost equally bad whether a licensed or unlicensed rogue, a dragoon or a robber, be the person who assaults and plunders me?" 13 *The Complete Works of Henry Fielding, Esq.* 5 (Henley ed. 1903), quoted in Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 15 (1962).

In addition, the collective police organization had information, which may or may not have been specifically communicated to Yates and Mead, that the robbers had demanded the cab driver's wallet, that the cab driver had reported his wrist watch was missing, and that Vaughn and Worrell had denied to police, probably falsely, having recently seen a cab driver or a fight in the area.

In addition, Yates and Mead may have learned from Mrs. Clark that shortly after she had seen two men beating the cab driver she had seen the same two men being talked to by officers at the same time and place (Tr. 196-197) that Yates and Mead had seen Stone talking to Vaughn and Worrell. Whether or not Mead recognized Vaughn when he saw him talking with Stone (Tr. 153), he and Yates may have put the names Vaughn and Worrell in Stone's robbery lookout together with Mrs. Clark's possible statement to him that she had seen the same two men she saw beating the cab driver being talked to shortly afterward by officers (which Yates knew to be Stone and his fellow officer) to conclude at the moment he heard the lookout that Vaughn and his companion were the two that Mrs. Clark had seen beating the cab driver and talking shortly afterward with officers. It is also possible that Mrs. Clark told Yates that she heard the cab driver tell a passer-by shortly after the assault "They tried to rob me" (Tr. 185), and that the neighbor she had recognized beating the cab driver had Bermuda shorts on. In any event, the record leaves no doubt that Yates had received a report of robbery from Stone with identifications of Vaughn and Worrell as suspects based on the cab driver's descriptions, that Stone knew Vaughn and Worrell had probably lied in denying having seen a cab driver or a fight, and that at the time of arrest Yates thus had firm probable cause for arrest. It would be a strange rule which on these facts would require the officers to let appellant proceed without detention or arrest, questioning, identification by the complainant, and search of the automobile for fruits and instrumentalities of the robbery.

It is not a valid objection that the arresting officer did not individually have all of the information sufficient to constitute probable cause where the collective information of the police was sufficient. This Court has already decided that probable cause is to be evaluated by the courts on the basis of collective information of the police rather than that of only the officer who performs the act of arresting. *Smith (James)* v. *United States*, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966); *Williams* v. *United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962).

The arrest being valid, the search incidental thereto was valid. The scope of this incidental search included fruits and instrumentalities of the robbery and weapons the seizure of which protected the officers and prevented escape. *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). The watch was within the scope of this lawful search and was lawfully seized.

To sustain conviction it is thus not necessary to show, were it possible, that the watch was taken during a lawful search prior to arrest based on probable cause for a warrantless search and thus constituted part of the probable cause for an ensuing arrest.[4]

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[4] Detaining a car for questioning in the District of Columbia is normally an arrest. *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961); *Henry* v. *United States*, 361 U.S. 98 (1959); *Smith (Edward)* v. *United States*, 122 U.S. App. D.C. 300, 353 F.2d 838, 840 (1965) n.1, *cert. denied*, 384 U.S. 974 (1966). This is not so well settled elsewhere, however. In *Carroll* v. *United States*, 267 U.S. 132 (1925), *Brinegar* v. *United States*, 338 U.S. 160 (1949), *Husty* v. *United States*, 282 U.S. 694 (1931) and *Preston* v. *United States*, 376 U.S. 364 (1964) the Supreme Court seemed to consider vehicles capable of being moved immediately in a category different from dwellings, to allow a broader scope for their search under the Fourth Amendment grounded on greater danger of disposal of things which offend the law, and to allow a search without arrest based on probable cause to believe the contents of the vehicle offend the law, which if confirmed by search will provide probable cause for a subsequent arrest. In *Henry* two dissenting justices stated: "While the Government, unnecessarily it seems to me, conceded that the arrest was made at the time the car was stopped, this Court is not bound by the Government's mistakes." 361 U.S. at 104-05.

In *Brinegar* Justice Burton, concurring, stated: "Government

The existence of probable cause for arrest at the time police blocked appellants' car makes it unnecessary in determining the validity of the arrest to show, were it possible, that appellants consented to wait in their automobile

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agents are commissioned to represent the interests of the public in the enforcement of law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for search but when there is reasonable ground for an investigation." *Brinegar* v. *United States*, 338 U.S. 160, 179 (1949).

The authority of police to question suspicious persons absent probable cause for arrest was recognized at common law. *Lawrence* v. *Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (C P. 1810); 2 Hale, *Pleas of the Crown* 89, 96-97 (American ed. 1847). The powers therein referred to are these of the night watch in England.

In *Rios* v. *United States*, 364 U.S. 253 (1960) the government urged the Supreme Court to give explicit recognition to the right of police to stop and question persons suspected of crime absent probable cause for arrest. The Brief for the United States argued at page 11 that:

> Being stopped by a police officer for the purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupant, had the police been able to ask him questions, could readily have explained as being entirely innocent. In a fair balancing of the interests at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary.

The Court disposed of the case without resolving the question whether police have such a right to detention for questioning, and if so within what kinds of limitations, returning the case to the lower court to determine when the arrest was made.

Recognition that in the District of Columbia police may search moving vehicles in certain cases without probable cause to arrest is reflected in this Court's statement in *Smith (Roy)* v. *United States*, 118 U.S. App. D.C. 235, 238, 335 F.2d 270, 273 (1964) that: "even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances, such as a significant possibility of removal or destruction of the object of the search."

until Tonkins could be brought to the scene to identify or "clear" them (Tr. 155, 162). There is likewise no need to show that the arrest was made after Tonkins' arrival and his identification of appellants as the two who tried to rob him (Tr. 159, 167). Nevertheless, assuming the arrest took place when, under appellants' version, Yates pronounced the formula, "You are under arrest for robbery" with drawn gun (Tr. 229-231, 295), it is clear that both the arrest and the arrival of Tonkins preceded the uncovering of the watch (Tr. 59, 96, 134, 158). Stone and Wiggs arrived with Tonkins at the arrest scene so quickly that Vaughn and Worrell each thought two police cars were present when they were stopped (Tr. 228, 294). Tonkins saw Yates pick the watch up (Tr. 59, 96, 158).

This is not a case, and appellants do not claim that it is a case, of a pretext arrest for one crime made to allow officers to search for fruits, instrumentalities or evidence of a separate crime which officers had some reason, falling short of probable cause to arrest for that crime, to think might be in the area searched. See *Taglavore* v. *United States*, 291 F.2d 262 (9th Cir. 1961) (search unreasonable where arrest for minor traffic violation made as a mere pretext for making search for narcotics). See *McKnight* v. *United States*, 87 U.S. App. D.C. 151, 183 F.2d 977 (1950). Here the arrest was primary and the search incidental.

Previous cases similar to this one make clear that here there was probable cause for arrest. In *Williams* v. *United States*, *supra*, the complainant told police that two men had broken into his house and robbed him. He recognized them as two men who had worked for a contractor repairing his home weeks earlier but did not know their names. At the investigating officer's behest the contractor located the defendant as one of the two. The investigating officer being unavailable to arrest the located supect, a new officer unaware of the details of the crime or why defendant was suspected but aware that defendant was wanted by the police was called upon to make the arrest. This Court held there was probable cause, saying that

the whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime. The Court thought it significant that the arresting officer was acting under orders to make the arrest. In the present case Yates was acting in response to a robbery lookout and knew much of the reason why appellants were suspected.

Other cases with elements in common with this case are *Ellis* v. *United States*, 105 U.S. App. D.C. 86, 264 F.2d 372, *cert. denied* 359 U.S. 998 (1959) (probable cause found where police looking for the person responsible for a series of housebreakings and armed with descriptions of a suspect saw defendant fitting the descriptions going onto the porch of a house in the area and he reacted evasively to police requests for identification); *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723 (1961) (probable cause found where a citizen told police someone had tried to "flim-flam" him, pointed to a car, and indicated defendant as the culprit and police followed the car until it stopped, asked occupants to get out, and saw a roll of money on the back seat); *Cogdell* v. *United States*, 113 U.S. App. D.C. 219, 307 F.2d 176 (1962) (probable cause for vagrancy arrest found where officer observed defendant, a known confidence operator, standing with another for fifteen minutes, approached and identified himself, and asked defendant's name, work, and how long both had been standing there, to all of which defendant lied for no apparent reason—case is significant as showing that unexplained lies to police can be an element of probable cause); and *Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966).

The watch being legally seized, the various motions to suppress it were properly denied.

II. Evidence was available to support jury findings that complainant's watch had been stolen, that appellants were in exclusive possession thereof shortly afterwards, and that their possession was not satisfactorily explained. The jury could infer therefrom that each was guilty of robbery. There was additional evidence of guilt of each appellant.

(Tr. 58, 99, 106, 107, 113, 114, 178-181, 225-226, 229-231, 247, 249-252)

There was sufficient evidence for the jury to find beyond a reasonable doubt that the watch had been stolen from the complainant (Tr. 58, 99, 106, 107, 113, 114), that appellants were in exclusive possession thereof shortly afterwards (Tr. 229-231, 251-252), and that the possession thereof was not satisfactorily explained (Tr. 225-226, 229-230, 249-252). It is a well settled rule of criminal law that the jury may infer therefrom that each defendant was guilty of robbery. This is sufficient in itself to sustain conviction. *Wood* v. *United States*, 120 U.S. App. D.C. 163, 344 F.2d 548 (1965); (*Fletcher*) *Smith* v. *United States*, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966). Yet there was additional evidence of the guilt of each, including the complainant's positive identification of Vaughn as the man who tried to take his wallet by force (Tr. 31-32), testimony by both Vaughn and Worrell and police that both lied when querried shortly after the robbery whether they had seen a cab driver or a fight (Tr. 102-103, 314, 252-253), Mrs. Clark's testimony that she heard a voice say "I'm not going to give it over to you" (Tr. 178-179), her testimony that she saw two men pulling on the doors of complainant's cab (Tr. 179-181), her positive identification of Vaughn as the man she saw enter the cab (Tr. 180) and Worrell's testimony that he was at the scene of the struggle between Vaughn and complainant but did not see anyone else there (Tr. 247).

Appellants' motions for judgment of acquittal based on claimed insufficiency of evidence to sustain conviction were properly denied.

III. The trial judge did not err in not instructing the jury separately that it could find one of the co-defendants innocent while finding the other guilty.

(Tr. 390, 392, 396, 397-400)

Rule 30, Federal Rules of Criminal Procedure, provides that

> "*No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict* stating distinctly the matter to which he objects and the grounds of his objection . . . " (Emphasis supplied).

Appellant Worrell nevertheless argues that the trial judge made a plain error affecting Worrell's substantial rights within Rule 52(b), Federal Rules of Criminal Procedure, by completing the jury instructions without giving a separate instruction that the jury had it within its power to find one of the co-defendants guilty while finding the other innocent. Worrell admits that his trial counsel did not object to the charge as given. The point was not raised at trial by proffering a separate instruction to afford the trial judge opportunity to give the separate charge if he felt it necessary. Vaughn's counsel declared himself satisfied with the instruction as given (Tr. 397). Worrell's counsel when asked whether he was satisfied concerned himself with another matter (Tr. 397-400).

The omission was not error. The argument that the jury may have believed that to find one co-defendant guilty it was forced to find both guilty is not supported by the instruction as given. The instruction spoke at many points in the singular of "the defendant", leading to the conclusion that the questions concerned had to be decided for each defendant individually. Following are examples: "Every defendant in a criminal case is presumed to be innocent, and this presumption remains with the defendant throughout the trial unless and until he

is proven guilty beyond a reasonable doubt" (Tr. 390). "The burden is on the Government to prove the defendant guilty beyond a reasonable doubt. This burden of proof never shifts throughout the trial. The law does not require a defendant to prove his innocence. . . ." (Tr. 390). "Now, the essential elements of the offense of robbery . . . are as follows: One, that the defendant took property of some value from the complainant . . . . Three, that the defendant took possession of such property from the person . . . ." (Tr. 392). "Some conduct by the defendant of an affirmative character in furtherance of a common criminal design or purpose is necessary. Mere physical presence by the defendant at the time and place of the commission of such offense is not by itself sufficient. . . ." (Tr. 396).

There are other examples of the trial judge's use of the singular. Admittedly, the judge often used the plural, as in the examples selected by appellant Worrell. But the net effect of the judge's lucid, uncluttered instruction, read whole, left the jury free to find none, one, or both of the co-defendants innocent.

If the lack of a separate instruction were error in these circumstances, it was harmless error within Rule 52(a), Federal Rules of Criminal Procedure.

There are no firm objective standards available to determine whether an alleged error constitutes plain error providing grounds for reversal in disregard of Rule 30. However, the purpose of the plain error rule and the general principles followed in judging whether plain error exists show that the omission of a separate instruction was very far from affecting substantial rights. The Supreme Court described plain error in *United States* v. *Atkinson*, 297 U.S. 157 (1936) saying at 160, "In exceptional circumstances, especially in criminal cases, appellate courts, in public interest, may, on their own motion, notice errors to which no exception has been taken, if errors are obvious, or if they otherwise seriously affect fairness, integrity, or public reputation of judicial proceedings." To ask whether this can be said of the omission made here is to say that it cannot.

In *Kotteakos* v. *United States*, 328 U.S. 750 (1946) [5] the Supreme Court held that an erroneous ruling which adversly affects the substantial rights of a party was reason to reverse if the record, taken whole, indicated a prejudicial ruling. The existence of plain error would thus not in itself justify reversal. This Court has similarly said, "But we must find substantial prejudice as well as error." *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). In determining whether a particular error was prejudicial, the relative strength of the government's case is considered. *Cross* v. *United States*, *supra; Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553, 554 n. 3 (1964). Errors which might call for reversal in a close case may be disregarded as harmless where evidence of guilt is strong. *Thomas* v. *United States*, 287 F.2d 527 (5th Cir. 1961), *cert. denied*, 366 U.S. 961 (1961).

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[5] The concept of harmless error in the United States originated from English case law dealing with erroneous admission of evidence. 1 Wigmore, Evidence Sec. 21 at 365 (3d. ed. 1940). The "orthodox" English rule was that evidence erroneously admitted or rejected was not grounds for reversal unless the truth was not forthcoming. The "Exchequer rule", promulgated in *Crease* v. *Barrett* in 1835, however, was subsequently interpreted so that any error in a ruling by the court created a right to a new trial, *i.e.*, the rule of automatic reversal. To avoid this rule, all fifty states and the federal government have developed harmless error provisions aimed at curbing frivolous appeals based solely on technical errors. In reviewing this history, the *Kotteakos* court said: "So great was the threat of reversal in many jurisdictions, that criminal trials became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained. In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound, and Hadley, to mention only four. The general object was simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record." *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946).

Judged by these standards, the absence of a separate instruction here cannot be said to have affected substantial rights.

The cases cited by appellant Worrell do not call for an opposite result. They rather illustrate the contrast between the area at which Rule 52(b) was directed and the present case. Defendant in *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951) was convicted of raping a nine year old girl and sentenced to death by the jury. He claimed he had been drinking and could remember nothing. There was enough evidence of insanity to raise the issue for the jury. Nevertheless, defendant's counsel told the jury in argument that a guilty verdict would be proper. The trial judge's jury instruction said nothing of the possible insanity defense. The court reversed and remanded for new trial, calling defense counsel's statement and the failure to instruct on the possible insanity defense plain errors which it noticed despite lack of timely objection. The court stressed that a defendant is entitled to have presented instructions relating to a theory of defense for which there was any foundation in the evidence. Appellant Worrell does not contend that there was any theory of defense with foundation in evidence upon which the jury was not instructed. Nor did his counsel argue to the jury that a guilty verdict would be proper under the circumstances. The reversal of the death sentence and conviction in the shocking *Tatum* case have no bearing on this case, where counsel for both prosecution and defense performed quite ably.

Blumenthal v. *United States*, 332 U.S. 539 (1947) was a conspiracy case in which certain of the conspirators had made damaging admissions and others had not. These statements had been introduced in evidence with the customary warning to the jury that they had no force as evidence against the defendants who had not uttered them. In speaking of the danger that the jury, in disregard of the court's direction, would transfer the effect of the admissions across the barrier to the non-uttering

defendants, the court said, "That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases . . . . It is therefore extremely important that those safeguards be made as impregnable as possible. Here, however, the case as presented involved none of the risks common to mass trials". *Blumenthal* v. *United States*, *supra*, at 559-560. The court noted approvingly that the trial judge showed great concern with minimizing this risk of transference in conspiracy cases by instructing that "the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to the kind of consideration on your part as if he were being tried alone." *Id.* at 560. Finding no prejudice from introducing admissions with careful warnings like this, the court affirmed the conviction. There are important distinctions between conspiracy, where each co-conspirator is liable for the acts of the others and large numbers of defendants are often tried together, and robbery. There is an important distinction between an instruction warning a jury that a damaging admission introduced against one who made it is not evidence against other defendants and a jury instruction in a robbery case involving two defendants. The purposes of the law pertaining to robbery and to conspiracy will be served by continuing to recognize these distinctions. *Blumenthal* has no bearing on the present case.

The omission complained of only at this late date was no error. Were it error, it would not be plain error; failure to make timely objection would preclude raising the point now. Were it plain error, it would not be so prejudicial as to be reversible.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
Assistant United States Attorney.

ROBERT A. ACKERMAN,
Attorney, Department of Justice.

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,066

Paul E. Vaughn,
Appellant

v.

United States of America,
Appellee

Appeal from the United States District Court for the District of Columbia

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Edwin S. Rockefeller
1225 19th Street, N. W.
Washington, D. C. 20036

Counsel for Appellant
(Appointed by this Court)

November 28, 1967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Paul E. Vaughn, Appellant	)	
v.	)	No. 21,066
United States of America, Appellee	)	

REPLY BRIEF FOR APPELLANT

Appellant Vaughn raises the question - where there is no evidence that there has been any taking from the victim, is it error not to direct a verdict of acquittal in a trial on a one-count robbery indictment? Appellant Vaughn's brief pointed out that there is no evidence that anyone took a watch from the person or from the immediate actual possession of Tonkins.

The Government's brief devotes a single page (p. 19) to the sufficiency of the evidence, missing entirely the point raised by appellant Vaughn. The Government argues from evidence that a watch had been stolen, that appellants were in possession

of the watch, and that their possession was not explained -- from this evidence, the Government contends, the jury could properly infer that each of the appellants was guilty of robbery. We submit that this inference simply does not follow. It might be, if there was sufficient evidence on each of these points (which we do not concede),[1/] that the jury could properly infer guilt of larceny, but it could not properly infer guilt of robbery.

The Government cites in support of its erroneous conclusion two inapposite cases: Wood v. United States, 120 U.S. App. D.C. 163, 344 F.2d 548 (1965) and (Fletcher) Smith v. United States, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966). In the Wood case there was evidence that someone had entered the victim's home either through an open second-floor skylight or by breaking a lock on a back-yard gate and had removed a television set, some clothing and a ring. Wood's sister, who lived next door to the victim's home, testified that Wood brought a television set to her house at approximately the time that others testified that the property was taken.

1/ The Government contends that "there was sufficient evidence for the jury to find beyond a reasonable doubt that the watch had been stolen [robbed?] from the complainant." The evidence is ambiguous as to when Tonkins first realized that

Footnote cont.:

his watch was missing. There is no evidence as to <u>how</u> he may have lost it. The transcript references cited in the Government's brief (Tr. 58, 99, 106, 107, 113, 114) point to testimony which is equally consistent with the following theories:

a. that Tonkins lost his watch in the course of a struggle with Vaughn and neither person was aware of the loss;

b. that Tonkins lost his watch three hours before any struggle with Vaughn began, or

c. that Tonkins lost his watch three days prior to the incident on August 17.

The Government further contends "that appellants were in exclusive possession thereof shortly afterwards." There is no evidence that Vaughn ever had any possession of Tonkins' watch, exclusive or otherwise. The evidence is that Worrell picked up the watch from "the grass at the rear of the taxi-cab" (Tr. 229), that he threw it on the seat of the car in which he and Vaughn were apprehended (Tr. 249), that he had no conversation with Vaughn about the watch (Tr. 249), and that, when the police asked Vaughn whether the watch was his, Vaughn said "no" (Tr. 231).

There was testimony identifying the television set which Wood took to his sister's as that which was taken. In a Per Curiam opinion, Chief Judge Bazelon was joined by Circuit Judges Fahy and McGowan in concluding: "Since there was testimony that appellant possessed stolen property so near to the time and place of the theft the jury may infer guilt both of larceny and housebreaking." The point raised by Vaughn is, that, even according to the Government's own interpretation of the evidence, the jury could not properly infer that a robbery occurred. Thus, this case is significantly different from the Wood case in which there was evidence that a larceny and housebreaking had occurred, and the inference in question was merely whether Wood was the guilty party.

The Smith case further illustrates the Government's failure to perceive the point we raise. In a Per Curiam opinion concurred in by Circuit Judges Wright, McGowan and Leventhal, the court in that case affirmed a conviction of unauthorized use of an automobile where there was testimony "that appellant was the person who unauthorizedly took the car

from the commercial parking lot, and that he was also the person found driving the car some three days later." It is difficult to see how the Government can hope to obtain from the Smith case any support for its argument that the jury could properly infer that Vaughn was guilty of robbery.

Having simply restated its unsupported position, that guilt of robbery could be inferred, and having cited as authority for this position the Wood and Smith cases only, neither of which support the proposition, the Government goes on to assert that "there was additional evidence of the guilt" of both Vaughn and Worrell. The Government then lists six items of evidence which neither alone nor in any combination supply what we submit is the missing element in this case -- evidence of the taking of a watch from the person or the immediate actual possession of Tonkins.

1. The Government points to "the complainant's positive identification of Vaughn as the man who tried to take his wallet by force." Had Vaughn been charged with attempted robbery of a wallet this testimony might have supplied an important element. In fact, Vaughn was not charged with attempted robbery of a wallet but an actual robbery of a watch.

(See indictment set out as Appendix.)

2. The Government points to testimony "by both Vaughn and Worrell and police that both lied when queried after the robbery whether they had seen a cab driver or a fight." One cannot possibly draw any inference from this testimony that a robbery occured.

3. The Government points to Mrs. Clark's testimony that "she heard a voice say 'I'm not going to give it over to you'". This might support a theory of attempted robbery of a wallet, as testified to by Mr. Tonkins, but cannot fairly be said to support any inference of taking of a watch.

4. The Government points further to Mrs. Clark's testimony that she saw two men pulling on the door of the cab and that she identified Vaughn as the man who entered the cab and to Worrell's testimony that he was at the scene with Vaughn but did not see anyone else there. The most that this evidence could be said to prove is no more than appellant Vaughn has himself conceded, that he was at the scene of the

incident in some sort of altercation with Tonkins.

We submit that the record in this case simply does not contain any evidence of the robbery of a watch, that the evidence is insufficient from which to infer guilt of Vaughn, that the jury could not properly so infer, that a verdict of acquittal should have been directed, and the conviction of robbery should be reversed and the indictment dismissed.

Respectfully submitted,

Edwin S. Rockefeller
Attorney for Appellant
(Appointed by this Court)

Appendix

The Grand Jury charges:

On or about August 17, 1966, within the District of Columbia, Paul E. Vaughn and John H. Worrell, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of David F. Tonkins, property of David F. Tonkins of the value of about $17.50, consisting of one watch of the value of $17.50.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of this Brief has been mailed first class postage prepaid to Frank Q. Nebeker, Assistant U. S. Attorney, United States Courthouse, Washington, D. C., and to Charles A. Case, Jr., 1625 K Street, N. W., Washington, D. C. 20006, counsel for John H. Worrell.

Edwin S. Rockefeller

November 28, 1967

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,067

JOHN H. WORRELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

November 28, 1967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

JOHN H. WORRELL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 21,067
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	

REPLY BRIEF FOR APPELLANT

I.

Appellee Has Failed to Show That at Time Appellant Was Arrested and the Watch Seized, the Police Had Probable Cause For an Arrest Without a Warrant

Appellee argues that it is not a valid objection that the arresting officer did not personally have all of the information sufficient to constitute probable cause when the collective information of the police was sufficient, citing Smith v. United States, 123 U.S. App. D.C. 202, 358 F. 2d 833 (1966) and Williams v. United States, 113 U.S. App. D.C. 371, 308 F. 2d 327 (1962). These cases are not dispositive of the issue in this case.

Appellant contends here that the four police officers involved did not have probable cause, either individually or collectively, for believing

that a robbery had been committed until Appellants had been apprehended a second time, a search of the automobile had been made, the watch found and the police inquired of the complaining witness, Tonkins, if he had lost anything. In short, the collective information of the police before the arrest was made is not sufficient to establish probable cause.

Weighing the testimony of each of the four police officers in addition to the testimony of the complainant, Tonkins, and the witness Jessie Clark, it is clear that Appellant's arrest does not fit the test laid down in the Smith and Williams cases.

Officers Stone and Wiggs testified that they had moved in on a call for a fight sent to Officers Mead and Yates in a different scout car. Stone testified that he and Wiggs came upon Tonkins near the scene of the fight who said that he had been robbed (1 Tr. 106). Stone then testified that he put on the air a description of the two subjects and the words "Subjects may be the ones responsible for the robbery." (1 Tr. 107).

Stone's testimony at 1 Tr. 106 about what Tonkins had said is in conflict with Tonkin's version of that same conversation at 1Tr. 99-100 where Tonkins stated:

> "A. I told him I did not make a complaint. I hadn't called any police, and I told him that I had been both hit and that my wallet had been demanded. And then I told him that I could identify one of the men that did it, and I also told him that the man I could identify came into the car and he had on bermuda shorts, kind of

> short, and a brownish-yellow, brown sweater and they said, 'Follow me' and I followed them.
>
> "Q. Well now, did you tell the police officers that subsequently when you offered your wallet, it was refused.
>
> "A. No, I did not tell them that."

Tonkins testimony is corroborated by the testimony of Jessie Clark, the only disinterested person who testified as a witness. Mrs. Clark testified that she had observed a fight and that she recognized the man who entered Tonkin's cab and hit Tonkins (2 Tr. 181-182). She also testified that she called the police and later heard Tonkins state (apparently to Stone and Wiggs) "they tried to rob me" (2 Tr. 185). She did not testify that she saw anything taken.

Tonkin's testimony is also confirmed by the testimony of Officer Yates who made the arrest. He testified that he acted pursuant to a "look out" and "didn't know if it was for a robbery." (1 Tr. 165-166). The first time it occurred to Officer Yates that there was reason to believe a crime had been committed was when Tonkins arrived on the scene where the arrest had been made and said, "Here are the ones who tried to rob me." (1 Tr. 167). Nor did Yates testify that he or Mead got any information about a robbery from Mrs. Clark.

Tonkin's testimony is clearly more believable than Stone's regarding their first conversation. That conversation did not provide information

to Stone sufficient to cause him to believe a robbery had been committed. Stone's testimony at 1 Tr. 114 concerns a second conversation with Tonkins at the scene of the arrest. It cannot be used to support Stone's alleged lookout for a robbery which occurred after his first conversation with Tonkins. Nor does Stone's testimony show that he talked to Mrs. Clark or knew of any conversation with her about the incident.

The most reasonable hypothesis is that Tonkins did not tell Stone that he had been robbed. Since Stone and Wiggs had already apprehended Vaughn and Worrell and asked them for identification, it is much more probable that he flashed on the air a more positive identification of the suspects and that he did not say anything about an actual robbery. As a witness, he probably confused the first and second conversations with Tonkins. The testimony of all other witnesses, including Officer Yates, gives solid credence to this hypothesis. Moreover, if Tonkins said "they tried to rob me" Stone would have been under a duty to inquire about the object which the suspects had tried to take. Neither Stone's testimony nor Tonkins' shows that Stone made the necessary inquiry to determine whether Tonkins' statements were credible. In Beck v. State of Ohio, 379 U.S. 89 at 99 the Supreme Court said:

> "It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for petitioners' arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to

> show with considerably more specificity than was shown in this case why the officer thought the information was credible."

Appellee has clearly failed to establish that the police officers, individually or collectively, had probable cause to believe that a robbery had been committed. Accordingly, the arrest of the appellants and the search incident to that arrest were unlawful and the Trial Court erred in refusing to grant Appellant's motion to suppress evidence obtained pursuant to an illegal search and seizure.

II.

Appellee Has Failed to Show That Appellant's Motions for Acquittal Were Properly Denied

Appellee contends that since there was sufficient evidence for the jury to find that the watch was stolen from the complainant and that appellants were in the exclusive possession of it, the jury may infer therefrom that each defendant was guilty of robbery. For this proposition Appellee cites Wood v. United States, 120 U.S. App. D.C. 163, 344 F. 2d 548 (1965) which affirmed a conviction for house breaking and petty larceny, and Smith v. United States, 123 U.S. App. D.C. 259, 359 F. 2d 243 (1966) which affirmed a conviction for unauthorized use of an automobile.

As this court pointed out in Cooper v. United States, 357 F. 2d 274, 277, identification of Appellant by victim was not enough, that it was plain error for the judge not to instruct the jury that conviction of

co-appellant Cooper would require a belief that he participated in the crime.

As this Appellant showed in his main brief, evidence that a robbery occurred was wholly circumstantial. Tonkins did not state that he knew when the watch was taken. It could have been lost at some other time. It is even possible to believe that Tonkins gave the watch to one of the Appellants at a different time and place. Only by construing the evidence in a light most favorable to Appellee can it be inferred that the watch was taken from Tonkins during the fight between Tonkins and Vaughn.

But even if it is reasonable for the jury to conclude that the watch was taken, Appellant Worrell submits that there is not a scintilla of evidence showing that he committed a robbery or even participated in a robbery upon Tonkins. The only evidence against Worrell is that he was on the scene (2 Tr. 247) and that he was shaking Tonkins' car door (1 Tr. 25; 2 Tr. 179). On this point great weight should be placed on the testimony of Jessie Clark, the only disinterested observer of the incident who testified as a witness in this case.

III.

The Trial Court Committed Plain Error Which Affected the Substantial Rights of the Appellant by not Instructing the Jury that it was Within Its Power to Find One of the Co-Defendants Innocent While Finding the Other Guilty

Appellee's arguments regarding the propriety of the instruction

might have validity if the evidence had shown that the co-defendants had a common purpose of robbing Tonkins or that Worrell had actually participated in a robbery. But the evidence shows neither. In this circumstance the Trial Court had a special duty to instruct the jury regarding its responsibility to make an independent determination with respect to each defendant. He failed so to do and that failure constituted, on the basis of this record, plain error affecting the substantial rights of Worrell. Tatum v. United States, 88 U.S. App. D.C. 386, 389, 190 F. 2d 612 (1951); Blumenthal v. United States, 332 U.S. 539, 560 (1947). Appellee's arguments are without merit.

CONCLUSION

Appellant Worrell urges that the decision of the United States District Court for the District of Columbia be reversed as to the offense of robbery.

In the alternative, Appellant urges that the case be remanded with instructions in accordance with these points set forth in Appellant's main brief.

Respectfully submitted,

Charles A. Case, Jr.

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Attorney for Appellant, Worrell
(By Appointment of this Court)

1625 K Street, N. W.
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November 28, 1967

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the within brief is hereby acknowledged this 28th day of November, 1967.

David G. Bress
United States Attorney for
the District of Columbia

By _____

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,066

PAUL E. VAUGHN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,067

JOHN H. WORRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING

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1. Preliminary Statement

On February 9, 1968, this Court reversed the robbery conviction of both appellant Vaughn and appellant Worrell with a comment that the facts had not been adequately appraised during the initial prosecutive judgment. Although it did not direct the entry of a judgment of

acquittal, the Court did direct that certain jury instructions, including a charge on lesser included offenses, be given "[i]n the event that the Government shall so proceed" with a new trial. The Court rejected appellants' contention that probable cause for their arrest was lacking and implicitly agreed that the victim's watch found on the car seat between appellants after their arrest was properly admitted into evidence.

The Court did not reverse on any of the points dealt with in briefs or at oral argument. It reversed apparently holding that exclusive and unexplained possession of recently stolen property is insufficient to support a conviction for robbery, unless there are additional circumstances in proof from which it might be inferred that the accused had formed the specific intent to rob. The core of the decision appears to be that, "at trial there was no showing as to circumstances from which it might be inferred that either or both had formed the *essential* specific intent" (emphasis added). Without such a showing, the decision indicates, it is incorrect to permit the jury to infer that the defendants are guilty of robbery from possession of recently stolen property.

We submit that where there is independent proof of the robbery, appellants' exclusive possession of recently taken property is sufficient in itself to support the guilty verdicts if the jury is unsatisfied with the explanation for that possession.[1] We believe the panel's decision raises a serious question concerning the Government's burden of proof in a robbery prosecution in which the defendant unsatisfactorily explains possession of property taken in a recent robbery. For this reason we respectfully urge this Court to rehear this case.

The facts of this case reflect a concerted *and expressed* intent by the appellants to rob a taxi driver of his wallet. Because of his somewhat remarkable courage the original objective was defeated. In the process the driver's watch,

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[1] Though not specifically made part of a requested instruction, the defense claim of mistake in taking the watch was apparently rejected by the jury.

not the object of the expressed undertaking, was forcefully removed from his possession. The driver was not immediately aware of the fact that his watch was gone. On these facts we are hard-pressed to find an inadequate appraisal of the facts which led the Grand Jury to conclude that appellants,

> . . . . by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of David F. Tonkins, property consisting of one watch of the value of $17.50.

Unlike many other serious and similar cases this robbery of a taxi driver was accompanied by a statement of the robbers that they intended, inferrably, to take the driver's money. The offense was also witnessed by a woman situated nearby. We do not view as material that a watch, rather than money, was taken since the law appears clear that one intends to take the property actually taken, even if it was not originally the object of the illegal quest.

2. Argument

A clear line of cases from *Tractenberg* v. *United States*, 52 U.S. App. D.C. 396, 293 F. 476 (1923) through *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966) has steadily held that unexplained possession of recently stolen property may in itself sustain conviction of theft. These cases have not distinguished the sufficiency of such unexplained possession to support conviction among the various types of theft, larceny, robbery, housebreaking, and burglary. They have rather spoken of the inference as it applies to theft in general, as did the Supreme Court in *Wilson* v. *United States*, 162 U.S. 613, 619-620 (1896) when it said in words often quoted that:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight un-

> less explained by the circumstances or accounted for in some way consistent with innocence . . . . The trial judge [properly] did not charge the jury that they should be controlled by the [inference] arising from the fact of the possession of the property . . . but that they might consider that there was [an inference] and act upon it, unless it were rebutted by the evidence or the explanation of the accused.

This Court has similarly stated in *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 229-230, 139 F.2d 365, 368-369 (1943), *cert. denied*, 321 U.S. 769 (1964) (convictions for housebreaking and larceny affirmed where such possession was the only evidence identifying the accused as the guilty person) that:

> . . . possession of recently stolen property, unexplained, is sufficient to support a verdict of guilty in larceny [citing *Tractenberg*]. Housebreaking, robbery, and burglary are merely aggravated forms of larceny [footnote omitted] and there is no reason why evidence competent in one case should not be competent, also, in the others. [footnote omitted] In fact, the Supreme Court has extended the rule so far as to declare the possession of the fruits of crime, recently after its commission, may be of controlling weight in a *murder* case, unless explained by the circumstances or accounted for in some way consistent with innocence. [citing *Wilson*; emphasis in original.]

Other cases in this unbroken line include *Wright* v. *United States*, 89 U.S. App. D.C. 70, 189 F.2d 699 (1951); *Gilbert* v. *United States*, 94 U.S. App. D.C. 321, 215 F.2d 334 (1954); *McGill* v. *United States*, 106 U.S. App. D.C. 136, 270 F.2d 329 (1959), *cert. denied*, 362 U.S. 905 (1960); *McAbee* v. *United States*, 111 U.S. App. D.C. 74, 294 F.2d 703 (1961), *cert. denied*, 368 U.S. 961 (1962); *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962); *McKnight* v. *United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); *Travers* v. *United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964); *Wood* v. *United States*, 120 U.S. App.

D.C. 163, 344 F.2d 548 (1965); and *Robertson* v. *United States*, *supra*, (1966).

None of these cases indicated that additional evidence from which specific intent might be inferred is necessary to sustain conviction in addition to the unexplained possession. On the contrary, they are pervaded by the thought that evidence of the unexplained possession may itself constitute sufficient evidence of both the taking and the intent to take, where these are essential elements of the offense charged. *Gilbert* is directly in point, the Court having ruled unambiguously that unexplained possession of stolen property constitutes in itself a circumstance from which the jury may infer the possessor had formed the intent to take and had participated in the taking. The accused was found driving a truck with a companion a day after it had been stolen from the companion's former employer. The accused had also arranged to dispose of certain equipment stolen with the truck. He told investigating officers, in attempted explanation for his involvement, that he and the companion "went up and got the truck but he stated he waited a block away and [the companion] picked him up." The accused made no attempt at trial to explain his possession. The trial court denied his motion for directed verdict on grounds that the Government had failed to establish by proof beyond a reasonable doubt that he had the necessary intent. The Court rejected his contention, holding that the unexplained possession was sufficient proof of the accused's larcenous intent. The Court noted the strength of the evidence of his possession and his failure to offer the trial court any explanation for his participation in the taking of the truck or in arranging to dispose of the stolen equipment.

Wigmore and Wharton are equally clear that where the possession of the stolen goods gives rise to the inference, it is sufficient evidence on which the jury may reach a conviction. 9 Wigmore, Evidence Sec. 2513 (3d ed. 1940). 1 Wharton, Criminal Evidence Sec. 135, n. 19 (12th ed. 1955). Neither says anything of a need for evidence in

addition to that of possession to prove intent. Note, *Criminal Law—Evidence—Presumptions Arising from Possession of Stolen Goods*, 46 Colum. L. Rev. 460 (1946) agrees that, "[the word 'presumption'] is now generally used to denote a permissible inference which will support a conviction." The Note states that this result is sometimes achieved by holding that the presumption is one of fact (permissible inference), not of law (mandatory inference). Sometimes the result is achieved by saying that the evidence of possession is *prima facie* evidence of guilt. 46 Colum. L. Rev. 463, n. 18.

The trial judge clearly presented to the jury the relation of the necessity of finding specific intent to steal and the permissibility of their doing so by drawing the inference. He stated at three different points that a finding of specific intent to steal must precede a robbery conviction—first, in his summary description of the essential elements of robbery (Tr. 392-393), second, in his fuller discussion of each element (Tr. 395), and third, after a request by counsel, in a supplemental instruction that, "The offense of robbery does require the specific intent." The second statement ("that the defendants took such property and carried it away without right to do so and with the specific intent to steal it") immediately preceded the standard instruction on the possession of stolen property, the first sentence of which was, "If you find beyond a reasonable doubt that the defendants were in exclusive possession of the property of the complainant and that this property had recently *been stolen*, and that the defendants' possession on the date in question has not been satisfactorily explained, then you may, if you see fit to do so, infer therefrom that the defendants are guilty of robbery." (Tr. 395—emphasis added). We submit this language made clear that in drawing the inference, if it chose to do so, the jury would be finding the essential specific intent. The very word, "steal" as used in the instruction on the inference itself imports the elements of specific intent. " 'To steal means to *take away from one* in lawful possession without right with the *intention to*

keep wrongfully' ", the Supreme Court has noted. *Morrissette* v. *United States*, 342 U.S. 246, 271 (1952) (emphasis added). This is the understanding of steal not only among lawyers using this word of art but also among laymen generally. These instructions told the jury that to convict they must find specific intent and that they would be finding specific intent if they chose to draw the inference.

Were separate evidence of intent necessary, it was submitted at trial. Regarding Vaughn, both the cab driver and Mrs. Clark positively identified Vaughn as the man each saw enter the cab. The cab driver testified Vaughn demanded his wallet and hit him on the head, saying, "I'm not playing. Give me your wallet. Give me your wallet." Vaughn was a big man, thirty-two years old and had a confederate with him. The victim was sixty years old, and alone and like many victims of late, a cab driver. The victim testified he refused to turn over the wallet saying, "I'm not going to give it to you. I'm not going to give it to you. Mrs. Clark testified she heard words to that effect. She saw the man she identified as Vaughn appear to his or pull" on the victim. She testified she saw Vaughn "on his knees in the cab punching at" the victim. She saw the victim kick Vaughn out of the cab, saw Vaughn re-enter, and saw the victim continue to kick at Vaughn to find him off. She called, "Leave that man alone" and that she was going to call the police. Shortly afterwards she saw Vaughn and his confederate run away. She heard the victim tell a passer-by, "They tried to rob me. She saw him shake his hands, one of which appeared to hurt him. An officer shortly saw that the victim's finger was bleeding from a cut.[2] To us these

[2] Wharton says: "The authorities are agreed that a sudden taking or snatching may be accompanied by sufficient force to constitute robbery. Thus it is robbery if any injury is done to the person of the victim in the process of snatching the property from him, or if he struggles to retain possession, or if the article is so attached to the person or the clothing of the victim that resistance is offered to the taking by virtue of such attachment or the taking causes harm." 2 Wharton, *Criminal Law and Procedure* Sec. 561

circumstances pointed to a violent robbery-intended, attempted, and, as shown by the watch, consummated, though not to the complete satisfaction of the perpetrators.

Regarding Worrell's intent, Worrell was shown beyond question to have been with Vaughn immediately before, during, and after Vaughn's attack on the victim. Mrs. Clark testified that she saw another, slimmer man with Vaughn and that both were initially pulling on the doors in an apparent effort to gain entry. The testimony of the victim, Mrs. Clark, Vaughn, and Worrell is all in accord that there were two persons, Vaughn and his companion, at the scene in addition to the victim. No witness testified that anyone else was present and the circumstances indicate strongly that no one else was. Vaughn and Worrell identified Worrell as being present. It is thus difficult to see how the second man pulling on the doors with Vaughn could have been anyone but Worrell. From his position it is thus likely that Worrell heard Vaughn demand the victim's wallet, saying, "I'm not playing. Give me your wallet. Give me your wallet." It is likely that Worrell heard the victim say, I'm not going to give it to you. I'm not going to give it to you; saw the victim kick Vaughn out of the cab; saw Vaughn reenter the cab; saw Vaughn punching the victim; and saw the victim kick Vaughn out a second time, all as the victim testified happened and as Mrs. Clark corroborated in good part. After Vaughn was kicked out the second time, the victim testified, he stood up and said something to the second man, *i.e.*, Worrell. Worrell likely heard Mrs. Clark call

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(12th ed. 1957) (footnotes omitted). Even assuming that the watch became dislodged from the victim's arm during Vaughn's effort to get the wallet and was on the ground outside of the cab when one of the appellants first acquired it, the watch would still have been taken from the immediate actual possession" of the victim as having been in an area a few feet away from the victim within which he could reasonably be expected to exercise some physical control over his property. The watch would have been in such possession that if the complainant knew that his property was being removed, such knowledge would likely have resulted in physical violence or a struggle for possession of the property. *Spencer* v. *United States*, 73 U.S. App. D.C. 18, 116 F.2d 801 (1940).

down, "Leave that man alone" and that she was going to call the police, after which she testified she saw the two men run off. The victim testified he asked a passer-by shortly thereafter, "if he saw the guys who jumped me?" Mrs. Clark testified she heard the victim tell a passer-by, "they tried to rob me." By his own testimony Worrell had the watch with him a few minutes later when he falsely denied to the police that he had seen either a cab driver or a fight. The testimony of Mrs. Clark, a disinterested witness, is in sharp conflict with that of Worrell that he came on the scene, saw the driver and Vaughn wrestling outside of the cab, and tried to lead Vaughn away. Her testimony agrees with that of the victim. These circumstances are sufficient in themselves to support a jury finding that Worrell had formed the intent to rob, without reliance on the inference from unexplained possession.

We thus submit the proven circumstances regarding the use of force and the intent to steal make it impossible to say here what was said of the evidence in *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 4, 316 F.2d 652, 655 (1963): "There is here no substantial evidence to show that the offense committed was robbery as distinguished from larceny. Every fact proved by the Government is as consistent with larceny, the lesser offense, as with robbery." See *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956).

WHEREFORE, appellee respectfully requests that the Court rehear this case.

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FRANK Q. NEBEKER,
Assistant United States Attorney.

ROBERT A. ACKERMAN,
Attorney, Department of Justice.

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

FRANK Q. NEBEKER,
Assistant United States Attorney.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Paul E. Vaughn,
Appellant

v.

United States of America,
Appellee

No. 21,066

ANSWER TO PETITION FOR REHEARING

The government's petition offers nothing new. There is no need for a rehearing. This Court correctly concluded that "at trial there was no showing as to the circumstances from which it might be inferred that either or both [defendants] had formed the essential specific intent."

The government now says that the Court has indicated "it is incorrect to permit the jury to infer that the defendants are guilty of robbery from possession of recently stolen property" and that "the panel's decision raises a serious question concerning the government's burden of proof in a robery prosecution in which the

defendant unsatisfactorily explains possession of property taken in a recent robbery." (Emphases supplied.)

The government bases its argument on an assumption, not evidence, that a watch was stolen. There was no proof that the defendants possessed recently stolen property or property taken in a recent robbery. The government alleges that "in the process" of an attempt to rob a taxi driver of his wallet, "the driver's watch, not the object of the expressed undertaking, was forcefully removed from his possession." The allegation that "the driver's watch ... was forcefully removed from his possession" has no basis in the evidence.*

The undisputed facts are, as the Court recognized:

(1) the owner of the watch, the subject of the alleged robbery, did not testify how, when or where he lost his watch;

(2) the watch was found in the automobile in which the two defendants were seated;

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* The government comes close to recognizing this failure of proof by citing to support this allegation -- not testimony in the record, but the conclusion of the Grand Jury in the indictment!

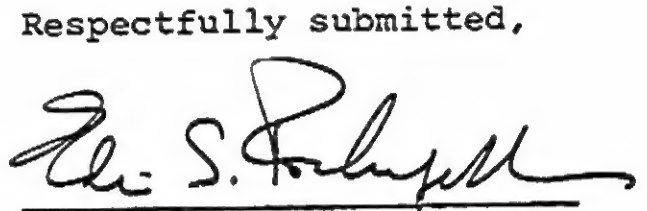
(3) Worrell testified that he found the watch and Vaughn testified that he did not even know of its existence;

(4) there was no other evidence to assist the jury in deciding whether the watch was lost, strayed or stolen in the course of an attempted robbery or at some other time.

The Court's decision of February 9 reversing the conviction for robbery is clearly correct.

WHEREFORE, Appellant Vaughn respectfully requests that the Court deny rehearing.

Respectfully submitted,



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March 22, 1968

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of this Answer has been mailed first-class postage prepaid to Frank Q. Nebeker, Assistant U.S. Attorney, United States Courthouse, Washington, D.C., and to Charles A. Case, Jr., 1625 K Street, N.W., Washington, D.C., 20006, counsel for John H. Worrell.

Edwin S. Rockefeller

March 22, 1968